No. 87-675

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THOMAS LEROY JOHNSTON,
Petitioner,

vs.

JOHN MAKOWSKI, Warden of
Connors Correctional Center,
and ROBERT H. HENRY,
Attorney General of Oklahoma

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE*
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, FEDERAL DIVISION

JOHN GALOWITCH
ASSISTANT ATTORNEY GENERAL
112 State Capitol Bldg.
Oklahoma City, OK 73105
(405)521-3921
ATTORNEYS FOR PETITIONER

*Counsel of record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules

I.

QUESTIONS PRESENTED

1. Whether Petitioner's failure to raise any special or important reason compelling the exercise of this Court's discretion should result in the denial of his Petition for a Writ of Certiorari?

2. Whether Petitioner in the Courts below or in his Petition for a Writ of Certiorari has presented any persuasive argument that would indicate that the lower federal courts incorrectly afforded a presumption of correctness to the State trial court's findings of fact in regard to the presence in the jury room of an unadmitted defense exhibit?

3. Whether the lower federal court properly determined under the totality of the circumstances that the identification of the Petitioner here was

reliable, even assuming that a prior photographic identification procedure was impermissibly suggestive?

II.

STATEMENT OF THE CASE

A. Procedural Background.

The Respondents generally agree with the procedural background contained in Petitioner's Petition for Writ of Certiorari which was earlier submitted to this Court.

B. Factual Background.

1. Police Report Not Admitted In Evidence in Jury Room.

All of the courts that have previously reviewed this issue at both the state and federal levels have been in agreement that the presence in the jury room of the police report that was not

formally admitted into evidence was not considered by the jury in reaching their finding of guilt on the charges upon which this Petitioner stands convicted. In pertinent part, the United States Court of Appeals for the Tenth Circuit said in regard to this issue the following:

> Appellant filed a motion in the State trial court for a new trial and for a hearing concerning the presence of the police report in the jury room. On March 24, 1982, the Court held an evidentiary hearing on the Motion. The Court heard testimony from the court reporter, the bailiff, the jury foreman--Robert P. Valleroy--and another juror--William G. Cochran. Valleroy testified that he was absolutely certain that the police report had not been discussed until after the verdict on the rape count had been reached. He stated that the report therefore had no bearing whatever on the rape conviction. He testified further that he was 99% certain that the report had no bearing on the verdict as to the sodomy and kidnapping counts. Cochran testified that no mention of the report was made in the jury

> room until that part of the deliberations concerning sentencing.
>
> At the conclusion of the hearing, the trial judge found that the jury had received the exhibit improperly but had not considered it until the sentencing part of the deliberations. The Court therefore granted Appellant's Motion for New Trial as to sentencing only. After a new trial as to sentencing the new jury fixed Appellant's sentence at fifty (50) years on each count, to run concurrently. (emphasis added).

Johnston v. Makowski, 823 F.2d 387, 389-390 (10th Cir. 1987).

The United States Court of Appeals for the Tenth Circuit, which utilized a more stringent standard even than the Oklahoma Court of Criminal Appeals on this issue, found under any standard that this Petitioner's claim had no merit. The Tenth Circuit held as follows on this issue:

> The State trial court found that the police report was not used until the sentencing part of the jury deliberations. Absent the applicability of one of the exceptions listed in 28 U.S.C. §2254(d) (1982), that finding of fact must be accorded the presumption of correctness. Kuhlmann v. Wilson, 106 S.Ct. 2616, 2630 (1986); Sumner v. Mata, 449 U.S. 539, 547 (1981). Appellant has advanced no persuasive argument that any of those exceptions apply. We therefore accept the correctness of the State trial court's finding that the jury did not consider the police report during the determination of guilt phase of the jury deliberations. Any conceivable prejudice was cured by the new trial as to sentencing. It is clear that Appellant's claim fails even under the stringent standard of [United States v. Marx, 485 F.2d 1179, 1184 (10th Cir. 1973)]. (emphasis added)

Id. 823 F.2d at 390-391.

The Tenth Circuit, thus, correctly determined that a presumption of correctness was to be accorded to the State trial court's factual findings in regard to the police report at issue in

this case and that this Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were not violated by the presence of the police report in the jury room during deliberations.

2. Prior Tainted Identification.

Even though the United States Court of Appeals for the Tenth Circuit found that one of two photo lineups was impermissibly suggestive in this case because Petitioner's picture was newly taken, whereas the other pictures in the array were older, that Court determined under the proper test that under the totality of the circumstances, the identification of this Petitioner by his victim was clearly reliable. Id. Thus, the Tenth Circuit utilizing the test

promulgated by this Court in such cases as Simmons v. United States, 390 U.S. 377, 384 (1968) and Manson v. Brathwaite, 432 U.S. 98, 114 (1977), said the following:

> Appellant spoke with [the victim] for approximately ten minutes before abducting her. In total, Appellant was in her view for 45 minutes. She testified that, although the parking lot was not lit, she could see his face because of the moonlight and the overhead light in her car. She gave a description of him immediately after the crimes had been committed. That description was very close to Appellant's actual appearance. [The victim] described his unique shoes and supplied the police with a newspaper advertisement depicting a similar pair.
>
> Moreover, the State appellate court had before it the composite drawing made on the night of the rape and commented on its likeness to appellant. The Court also had the photo array and lineup pictures. Based on a review of them, the court declined to find such improper suggestiveness as to exclude the subsequent in-court identification. The ultimate

> conclusion of that court is supported fully by the record.
>
> We hold that, although the photographic identification was impermissibly suggestive, under the totality of the circumstances Appellant's due process rights were not violated.

Id.

The Oklahoma Court of Criminal Appeals in affirming this Petitioner's conviction, essentially utilized the same test as that of the Tenth Circuit when it relied upon the factors enunciated by this Court in United States v. Wade, 388 U.S. 218 (1967). See, Johnston v. State, 673 P.2d 844 (Okl.Cr. 1983). The Oklahoma Court of Criminal Appeals further noted that the victim "never waivered in her identification of Appellant as her assailant." Id. at 847. Thus, all of the courts to this date that have reviewed the identification

procedure have determined that Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution were not violated by those procedures. All courts have further determined that the identification of this Petitioner as the assailant under the totality of the circumstances was clearly reliable under the standards, factors and tests as promulgated by this Court.

PROPOSITION I

PETITIONER'S FAILURE TO RAISE ANY SPECIAL OR IMPORTANT REASON COMPELLING THE EXERCISE OF THIS COURT'S DISCRETION SHOULD RESULT IN THE DENIAL OF HIS PETITION FOR CERTIORARI.

Although the Petitioner has identified sections of the United States Constitution which he claims are involved with his request for relief in this case,

review of the arguments raised by Petitioner revealed that he has absolutely failed to implicate in any way that his constitutional rights under the Fifth, Sixth or Fourteenth Amendments to the United States Constitution were violated in regard to his State court convictions. At best, Petitioner is merely seeking yet another appellate review of issues which have been thoroughly and exhaustively determined not to present constitutional implications in regard to those convictions. Simply put, this is not a request which justifies the exercise of this Court's jurisdiction under a Writ of Certiorari.

The purpose of the extraordinary remedy of Certiorari is to offer a limited review of a cause which has been

determined by a lower court. It should only be granted when the case under review presents a case of unfair justice, entitled to redress, but the ordinary forms of proceedings are not capable of providing relief.

This Court has limited access by way of Certiorari, recognizing that only fundamental questions of widespread importance should be considered:

> [I]t is very important that we be consistent in not granting the Writ of Certiorari in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal.

Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

The Supreme Court rules further delineate the narrow limits of this seldom granted request:

> [Certiorari is] not a matter or right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor.

Supreme Court Rule 19 (1).

In regard to the first issue raised by the Petitioner before this Court, he attempts to assert that there is a conflict between the United States Court of Appeals decision in this case and that of the United States Court of Appeals for the Fifth Circuit in the case of U.S. v. Shafer, 455 F.2d 1167 (5th Cir. 1972), because in Shafer, the Fifth Circuit held that a Defendant was not required to prove that an unadmitted exhibit was actually considered by the jury and that it could not be assumed that the jury did not see said exhibit. The Petitioner, however, misperceives the holding in this case as requiring a

criminal defendant to be held to such a burden of proof. This case, of course, was litigated in the federal courts as a Petition for Writ of Habeas Corpus challenging a state court conviction. It was not a case originally brought as a federal criminal case against a federal defendant and no issue in the federal courts either expressly or implicitly decided any issue in regard to burden of proof. The main issue in the federal courts in regard to the unadmitted exhibit was whether those courts were required by the pronouncements of this Court to give a presumption of correctness to state court findings that the exhibit was not considered by the jury in the guilt or innocence phase of Petitioner's state court trial. The controlling factors in a direct appeal

from a federal conviction are wholly distinguishable when a federal court is asked via a Writ of Habeas Corpus to overturn or interfere with a state criminal conviction. In the federal criminal situation the various courts of appeal in this country, of course, have superintending control over lower federal courts and they may decide issues that they cannot when they are asked to grant a Writ of Habeas Corpus in regard to a state court conviction. The cases of this court, particularly Kuhlman and Sumner, supra, clearly indicate that when a federal court is asked to overturn a state court conviction on a basis that has already been litigated in the state courts and those courts have made factual findings that are adequately and fairly supported by the record in the state

court that a federal court must accept those findings and give them a presumption of correctness. Such a result, contrary to the position of the Petitioner, does not evidence a split among the federal courts of appeal in this nation, but merely indicates and evidences that a federal court in a Habeas action challenging the constitutionality of a state court conviction has a different and more limited role than it would have if it was simply reviewing a criminal conviction out of a lower federal court.

Furthermore, to this date, this Petitioner has wholly failed to submit any evidentiary support that the jury in his case either reviewed, saw or considered the unadmitted exhibit in their deliberations in the guilt or

innocence phase of his trial. He has never submitted an affidavit from any of the ten jurors who were not called as witnesses at the state trial court hearing on the Motion for New Trial, even though he could have done so in the federal district court. As the United States Court of Appeals found, this Petitioner has simply failed to present any persuasive argument that any of the exceptions listed under 28 U.S.C. §2254(d) apply here that would allow a federal court to ignore the State trial court's finding that the exhibit here was not viewed or utilized by the State jury in its deliberations in the guilt phase of his trial. This decision of the Tenth Circuit was correct and the issue as raised by the Petitioner simply does not call for this Court's grant of the

extraordinary relief of Certiorari.

The second issue raised by Petitioner here, also does not raise any special or important reason for this Court to grant the extraordinary Writ of Certiorari. The record in this case shows that the Oklahoma Court of Criminal Appeals, the federal district court and the United States Court of Appeals utilized the appropriate test on this issue as promulgated by this Court in Simmons, Manson, and U.S. v. Wade, supra. All of said courts based on the record at Petitioner's trial determined that the identification by the victim of this Petitioner was clearly reliable and that said identification was an unwavering one of this Petitioner as her assailant. It is also interesting to note that even as to this second issue

raised by Petitioner here, i.e. the claim that one of the photo arrays shown to the victim was impermissibly suggestive, that the federal district court properly gave to the factual findings of the Oklahoma Court of Criminal Appeals a presumption of correctness under Sumner, supra. Therefore, in regard to the second issue, there is simply no special or important reason that would require this Court to utilize the extraordinary grant of a Writ of Certiorari.

PROPOSITION II

THE COURT OF APPEALS WAS CORRECT IN ITS DETERMINATION TO GIVE TO THE STATE TRIAL COURT'S FINDING A PRESUMPTION OF CORRECTNESS AND WAS FURTHER CORRECT THAT THE UNADMITTED POLICE REPORT WAS NOT CONSIDERED BY THE STATE COURT JURY DURING THE DETERMINATION OF THE GUILT PHASE OF JURY DELIBERATIONS.

Under 28 U.S.C. §2254(d), findings of fact by state courts are entitled to a presumption of correctness unless a Petitioner can satisfy a federal court that the presumption should be rebutted by one of eight statutory grounds. Section 2254(d) applies to cases in which a state court of competent jurisdiction has made a determination after a hearing on the merits of a factual issue. It makes no distinction or difference that the factual determinations were made by a state trial court or those of a state appellate

court. Sumner v. Mata, supra. As this Court noted in Sumner:

> A writ issued at the behest of a Petitioner under 28 U.S.C. §2254 is in effect overturning either the factual or legal conclusions reached by the state court system under the judgment of which the Petitioner stands convicted and friction is a likely result. The long line of our cases previously referred to accepted that friction as a necessary consequence of the Federal Habeas Act of 1867, 28 U.S.C. §2254. But it is clear that in adopting the 1966 amendment, Congress in §2254(d) intended not only to minimize that inevitable friction but also to establish that the findings made by the state court system "shall be presumed to be correct" unless one of seven conditions specifically set forth in §2254(d) was found to exist by the federal habeas court. If none of those seven conditions were found to exist, or unless the habeas court concludes that the relevant state-court determination is not "fairly supported by the record," "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous". (emphasis in original)

Sumner v. Mata, supra, 449 U.S. at 550.

In the present case, as noted in Proposition I, supra, the lower federal courts made a determination that none of the eight factors specified in Section 2254(d) applied to this case. In such a situation, the Petitioner was thus required to show by convincing evidence that the factual determination by the state courts in regard to the unadmitted exhibit not having any prejudicial effect in the guilt phase of the trial and not being utilized by the jury in its deliberation in such phase was erroneous. Further, as noted in Proposition I, supra, the Petitioner to this date has failed to present any such evidence to any court. He continues to rely on the record reviewed by the Oklahoma Court of Criminal Appeals and the federal courts that have now denied him a Writ of Habeas

Corpus in regard to his state court convictions. Therefore, the lower federal courts were correct in giving a presumption of correctness to the state trial court's findings that the jury did not utilize the involved exhibit in its deliberations in the guilt phase of the trial.

Even under the standard utilized by the Court of Appeals in this case relying on United States v. Marx, supra, and applying the proper presumption of correctness to the state court findings, there is not the slightest possibility that harm could have resulted from the police reports' presence in the jury room. This Petitioner seems to want to rely on a per se rule that the mere presence of an unadmitted exhibit in the jury room requires reversal of a criminal

conviction. He cites no cases supporting such a rule. Further, the problem with such a rule, of course, in this situation is that there is simply no evidence and no indication that the police report was ever considered or viewed by this jury in the guilt phase of Petitioner's state court trial. Further, contrary to the assertion of the Petitioner that the record as a whole does not support this factual determination the record before the State courts and the federal courts clearly supports a factual finding that this exhibit was not so utilized by the state court jury. The jury foreman testified at the Motion for New Trial that the jurors did not pay attention to the unadmitted police report until after they had voted Johnston guilty. He further testified that he was positive

that the police report was not considered on the rape conviction and that he was 99% sure that it was not considered for the sodomy and kidnapping offenses. He further testified that the exhibit had no bearing on the guilty votes for these two latter offenses and that he was almost positive the unadmitted exhibit did not come up until after the votes were taken finding Johnston guilty. The other juror that testified, Juror Cochran, indicated that the jury had reached its verdict prior to discovering the unadmitted exhibit. However, Juror Cochran indicated that members of the jury did apparently see the exhibit prior to the sentencing phase of the trial. Of course, any taint during the sentencing phase of Petitioner's trial was cured by a new sentencing proceeding. Therefore,

contrary to Petitioner's assertion that there is no evidence in the record to support the factual finding of the state trial court or that the record as a whole does not support such a factual finding, the record here is virtually conclusive that this jury during the guilt phase of the trial did not consider this unadmitted police report. In that the Petitioner has failed to overcome the presumption of correctness as found by the lower federal district court and the Court of Appeals, this Court is respectfully requested to deny his Petition for Writ of Certiorari.

PROPOSITION III

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT PROPERLY DETERMINED THAT THE IN-COURT IDENTIFICATION BY THE VICTIM OF THIS PETITIONER WAS RELIABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST AS PROMULGATED BY THIS COURT.

Petitioner claims that the victim's identification of him at trial should have been suppressed because it was tainted by an impermissibly suggestive pretrial identification procedure. As the Court of Appeals determined, the identification of this Petitioner at trial had sufficient indicia of reliability to render it admissible. The victim talked face to face with the Petitioner for approximately 10 minutes just prior to the sexual assault. She was with the Petitioner for approximately 45 minutes.

The description of the Petitioner given to the police shortly after the crime was a good description. The victim never identified anyone other than the Petitioner as her assailant; the victim never failed to identify the Petitioner as the assailant and the victim first identified this Petitioner as her assailant only two weeks after the crime. The Oklahoma Court of Criminal Appeals further made specific factual findings in regard to this claim of error of the Petitioner:

> [The victim] never waivered in her identification of Appellant as her assailant. The description she gave to police the night of the attack was a rather good description of Appellant, especially viewing the composite drawing made at the police station that night. The discrepancies were not that great. Neither were the differences between Appellant and the other men in the lineups and, although [the victim] was not abducted from a well-lighted area,

> she spent about 45 minutes with him and was aided by moonlight and the vehicles' overhead light in viewing the assailant.

Johnson v. State, 673 P.2d at 847. These factual findings of the Oklahoma Court of Criminal Appeals are entitled to a presumption of correctness under 28 U.S.C. §2254(d), just as the findings of fact in regard to the unadmitted exhibit discussed earlier.

Further, the United States Court of Appeals for the Tenth Circuit utilized the appropriate test as promulgated by this Court in determining under the totality of the circumstances the identification of this Petitioner was clearly reliable, even though that Court determined that one of the two prior photographic identification procedures were impermissibly suggestive. Johnston v. Makowski, 823 F.2d at 391. The Tenth

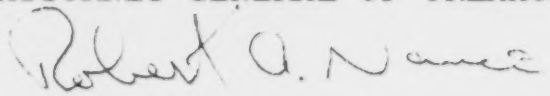
Circuit further correctly utilized the factors set forth by this Court in the case of Manson v. Brathwaite, 432 U.S. 98, 114 (1977). There is simply no reason submitted by the Petitioner that would indicate that the identification in court of this Petitioner as the assailant violated his due process rights under the Fourteenth Amendment to the United States Constitution, as all courts that have now reviewed the issue have so determined. In such a situation, this court has been presented with no reason, other than Petitioner's seeking to gain another review of his conviction, to grant the extraordinary Writ of Certiorari in this case.

CONCLUSION

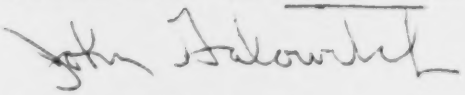
For all of the reasons specified above, this Court is requested to deny the Petition for Writ of Certiorari filed by this Petitioner.

Respectfully submitted,

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA



ROBERT A. NANCE
ASSISTANT ATTORNEY GENERAL



JOHN GALOWITCH
ASSISTANT ATTORNEY GENERAL